INDEX

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2, 3
Statutes Involved	4, 5
Statement of the Case	6-17
Reasons for Granting the Writ	17-29
Summary	30-31
Conclusion	32
Appendix:	
A. Opinion of Appellate Court	34-43
B. Judgment of Appellate Court	44, 45
C. Opinion of Appellate Court Denying Petition for Rehearing	46

CITATIONS

CASES:

	Page
Beatrice A. Anderson v. Atlantic Coast Line Railroad Co., 350 U.S. 807, 100 L.ed. 725 (1955)	32
Bogan v. Hynes, 65 F. 2d 523 (C.A. 9, 1933)	10
Julius Callmer, 19 T.C.M. 435 (1960)	29
Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278; 4 L.ed. 1218	6, 20, 23
Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co., 281 F. 2nd 646 (C.A. 6, 1960)	23
Commissioner v. State-Adams Corporation, 283 F. 2d 289 (C.A. 2, 1960)	25
Coosa Land Co. v. Commissioner, 103 F. 2nd 555, (C.A. 5, 1939)	10
Dobson v. Commissioner, 320 U.S. 489 (1943)	29
Elvins v. Seestedt, 193 So. 54 (Fla., 1954)	10
Stewart Forshay, 20 B.T.A. 537 (1930)	21, 27, 28
Hall v. Commissioner, 294 F. 2nd 82 (C.A. 5, 1961)	10
Industrial Union Oil Co., 5 T.C.M. 879	28
Jackson v. Commissioner of Internal Revenue, 233 F. 2nd 289 (C.A. 2, 1956)	26
Kay v. Key West Development Co., et al, 72 So. 2d 786 (Fla., 1954)	9, 31
K. C. Land Co., Inc. 19 T.C.M. 183 (1960)	28, 29
Knetsch v. United States, 364 U.S. 361 (1960)	31
McGriff v. McGill, 62 So. 2nd 28 (Fla., 1952)	10
Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436 (1943)	17, 18, 19, 21, 24, 27, 28, 30, 32

Page

Moro Realty Holding Corporation, 25 B.T.A. 1135 (1932) 28

John A. Mulligan, 16 T.C. 1489 (1951) 29

National Carbide Corporation v. Commissioner, 336 U.S. 422 (1949) 18, 19, 21, 27, 30, 32

Park Lane Apartments, Inc., 1940 B.T.A. Memo Decisions, par. 40,398 29

Paymer v. Commissioner, 150 F. 2nd 334 (C.A. 2, 1949) 24, 30

Poe v. Seaborn, 282 U.S. 101 (1930) 19

James L. Swafford v. Atlantic Coast Line Railroad Company, 350 U.S. 807, 100 L.ed. 725 (1955) 32

Worth Steamship Corporation, 7 T.C. 654 (1946) 28

STATUTES:

Internal Revenue Code (1939) (26 USC)

§ 13 (b) 19

§ 15 (b) 19

§ 162 (b) 19

Judicial Code

28 USC 1254 2

28 USC 1340 6

TEXTS AND OTHER AUTHORITIES:

Bittker, Federal Income Taxation of Corporations and Shareholders, p. 35 30

Blum, 40 Taxes, The Tax Magazine, p. 296, Apr. 1962 31

1947—1 Cumulative Bulletin 3 28

Rule 52, Federal Rules of Civil Procedure 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

W. M. MILES and EDITH P. MILES, his wife, et al,

Petitioners,

vs.

LAURIE W. TOMLINSON, District Director of Internal Revenue for the District of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, W. M. MILES and EDITH P. MILES, his wife, H. E. PONTIUS and LOVINA B. PONTIUS, his wife, and RALPH A. MARSICANO and MARIE B. MARSICANO, his wife, pray that a Writ of Certiorari issue to review the holding entered in this cause by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court delivered an Opinion on June 5, 1961 (Record P.P. 409-420). This Opinion is reported at 61-2 U.S.T.C. 9521 and 7 A.F.T.R. 2d 1656.

The Opinion of the Court of Appeals (Record P.P. 532-541) has been reported in 316 F. 2d 710 (1963). This opinion is appended hereto as Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit (Record P. 542), appended hereto as Appendix B, was entered on April 29, 1963. A timely petition for rehearing, (Record P.P. 543-551) filed on May 15, 1963, was denied (Record P. 552) on May 27, 1963. The opinion denying the Petition for Rehearing is appended hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

The appellate court, in reversing the trial judge, answered the following propositions adversely to your petitioners' contentions:

1. MAY A CORPORATION, FORMED AND AVAILED OF SOLELY TO HOLD MERE NAKED TITLE TO REAL PROPERTY BE TAXED ON THE GAINS DERIVED FROM THE ACTUAL OWNERS' DISPOSITION OF SAID PROPERTY?

2. DOES THE INTERNAL REVENUE CODE REQUIRE INCOME TO BE ATTRIBUTED TO A CORPORATION WHICH, THROUGHOUT ITS HISTORY, HAD NO BUSINESS TRANSACTIONS OF ITS OWN?

3. WHEN THE DISTRICT COURT'S FINDINGS OF FACT ARE NOT "CLEARLY ERRONEOUS" MAY THE APPELLATE COURT REVERSE OR DISREGARD THOSE FINDINGS?

This action of the appellate court is demonstrably erroneous, as shown by the reasons for granting this writ, which are presented by your petitioners.

I. THE OPINION OF THE APPELLATE COURT EVINCES A CLEAR MISUNDERSTANDING, AND A CONSEQUENT ERRONEOUS APPLICATION, OF PREVIOUS OPINIONS OF THIS COURT.

II. THE HOLDING OF THE APPELLATE COURT TOTALLY DISREGARDED CERTAIN JUDICIAL GUIDELINES SET DOWN BY THIS COURT FOR REVIEW OF CASES BY CIRCUIT COURTS OF APPEAL.

III. THE HOLDING OF THE APPELLATE COURT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

IV. THE APPELLATE COURT'S OPINION, BECAUSE IN DIRECT CONFLICT WITH THE TAX COURT'S HOLDINGS IN SIMILAR CASES, PRECLUDES UNIFORM ADMINISTRATION OF THE TAX LAWS.

STATUTES INVOLVED

26 U.S.C., §13,

(Internal Revenue Code of 1939, Section 13):

NORMAL TAX ON CORPORATIONS

(a) Definitions . . . .

(b) Imposition of Tax. — There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation (except a corporation subject to a tax imposed by section 231(a), Supplement G, or Supplement Q) — . . . .

(c) Exempt Corporations . . . .

(d) Tax on Personal Holding Companies . . .

(e) Improper Accumulation of Surplus . . . .

(f) Mutual Savings Banks Conducting Life Insurance Business . . . .

26 U.S.C., §15,

(Internal Revenue Code of 1939, Section 15):

SURTAX ON CORPORATIONS

(a) Corporation Surtax Net Income . . . .

(b) Imposition of Tax. There shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation (except a corporation subject to a tax imposed by section 231(a), Supplement G, or Supplement Q) a surtax of 22 per centum of the amount of the corporation surtax net income in excess of $25,000.00.

(c) Disallowance of Surtax Exemption and Minimum Excess Profits Credit . . . .

26 U.S.C., §22,

(Internal Revenue Code of 1939, Section 22):

GROSS INCOME

(a) General Definition. — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

(b) Exclusions From Gross Income. . . .
(c) Inventories. . . .
(d) Method Used in Inventorying Goods. . . .
(e) Distributions by Corporations. . . .
(f) Determination of Gain or Loss. . . .
(g) Gross Income From Sources Within and Without United States. . . .
(h) Foreign Personal Holding Companies. . . .
(i) Consent Dividends. . . .
(j) Income From Mortgages Made or Obligations Issued by Joint Stock Land Banks. . . .
(k) Alimony, Etc., Income. . . .
(l) Income of Decedents. . . .
(m) Services of Child. . . .
(n) Definition of "Adjusted Gross Income". . . .
(o) Dealers in Tax-Exempt Securities. . . .

STATEMENT OF THE CASE

Ostensibly, this suit for refund of income taxes was brought by the six individuals who paid these taxes as technical transferees of Milspinmar Corporation, (hereinafter referred to as Milspinmar) a Florida corporation. The ultimate question before the trial court was whether Milspinmar was subject to the taxes paid; therefore, the action has been handled as though, in all respects, Milspinmar itself were the actual litigant.

The jurisdiction of the District Court was invoked pursuant to Title 28 USC, Sec. 1340.

As a preliminary perusal of the transcript of record will indicate, the factual background of the case was exhaustively developed on trial. The determinative facts are not, however, either as numerous or as complicated as the size of the record indicates.

The trial judge heard the case for more than two days. Drawing on his acquaintance with the "mainsprings of human conduct" through long years of judicial experience — both state and federal[1] —, the trial judge framed his findings of facts in a clear and precise manner.[2]

For these reasons, petitioners submit the trial judge's findings, with record references, as the best available statement of the case:

---

[1]See *Commissioner of Internal Rev. v. Duberstein*, 363 U.S. 278, 289; 4 L.ed. 1218, 1227. The trial judge first assumed the bench as a County Judge in 1917. In May, 1919, he became a Circuit Judge (trial court of general jurisdiction in Florida) and served in that capacity until 1948. Two years later, 1950, the Judge was appointed to the Federal bench. He served in that position until 1961 when he retired from active service, subject to recall.

[2]Thus, the findings in the instant case are not subject to the same criticism as those of the District Court's referred to in *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960).

"1. In the summer of 1946, the Plaintiffs together with a Mr. Louis Spiner, mutually agreed to purchase a large tract of unimproved land as an investment."

(R. 98,99,100,217,381)

"2. The unimproved land they desired to purchase was situated in Section 5, Township 30, South, Range 18 East, in an area generally known as the Interbay Peninsula near the City of Tampa, Hillsborough County, Florida; and was then owned by the Southwest Tampa Storm Sewer Drainage District, a political subdivision of the State of Florida having the power of taxation. The said Drainage District agreed to sell the same for the sum of $9,800.00."

(R. 97, Plaintiffs' Exhibits 1 and 2, R. 99, R. 118, Plaintiffs' Exhibit 8)

"3. On or about August 15, 1946, the plaintiffs and Spiner (Spiner was unmarried) paid to the Drainage District the above mentioned purchase price of the land with their personal checks as follows:

Miles, Spiner and Pontius - $2,500.00 each;
Marsicano - 2,300.00

Marsicano equalized his investment in relation to the other three men by subsequently paying for title insurance and deed recording fees."

(R. 98, 100, Plaintiffs' Exhibit 3, R. 101, 452)

"4. Miles, Pontius and Marsicano were married at the time of the aforementioned payment, but Spiner was not. Each of the married parties took a 1/8th undivided interest each and Spiner took a 1/4th undivided interest. Also, the various parties resided in three dif-

ferent counties. In order to avoid title conveying complications, and simplify the pending and anticipated transactions in general, the interested parties discussed the desirability of appointing an individual trustee, but at Spiner's suggestion it was decided that a title-holding corporation would be more appropriate."

(R. 98,99,255,294,295,300)

"5. Thus, on or about the date the aforesaid personal checks were delivered to the Drainage District for the purchase of the property, the parties took the necessary legal steps under Florida law for the formation of a corporation which they named Milspinmar Corporation, deriving the word from the surnames of three of the principals."

(R. 99, 106, 197)

"6. The first, and only official stockholders' and directors' meetings of the Milspinmar Corporation were held on September 5, 1946. The principal item of business transacted was as follows: A resolution was adopted reciting the purchase of the Drainage District property by the individual parties, their proportionate ownership thereof, and their desire to take record title in the name of the corporation. The resolution then specifically provided:

> "'BE IT RESOLVED BY THE BOARD OF DIRECTORS OF MILSPINMAR CORPORATION.:
>
> "'(a) That the above described property shall be conveyed by the said Southwest Tampa Storm Sewer Drainage District, a corporation, to Milspinmar Corporation, and the deed or deeds conveying said property shall be accepted and the title held by Milspinmar Corporation for the use and

benefit of the aforesaid beneficial owners according to the interests set forth, for the purpose of facilitating the payments of taxes and to expedite the conveyance of any or all of said property.

"'(b) That the Corporation shall convey by good and sufficient deed, all or any part of the above described property to such grantees as the said beneficial owners above named may from time to time designate.

"'(c) That the Secretary of this Corporation shall issue to each of the aforementioned beneficial owners, a certified copy of this Resolution as evidence of their ownership and interest in the above described property'."

In accord with the mandate of the last sub-paragraph of the resolution, copies of the minutes were distributed to each of the parties as evidence of their ownership interest."

"Under the law of Florida, where such title-holding corporations are judicially recognized as being so common that there are 'hundreds' of them (*Kay v. Key West Development Co., et al.*, 72 So. 2d 786, 787, 788), this corporate resolution produced a mere naked or dry trust, which by operation of law, under the provisions of the statute of uses, merged both the legal and the equitable title in the beneficial owners, as absolute

owners in fee simple of the property *(Elvins v. Seestedt*, 193 So. 54, 57; *McGriff v. McGill*, 62 So. 2d 28, 30)."

(R. 107, Plaintiffs' Exhibit 5, R. 113, Plaintiffs' Exhibit 6, R. 208, 303)[3].

"7. At the request of the principals, the purchased land was conveyed by the Drainage District to Milspinmar Corporation by two deeds, each dated September 6, 1946, the day following the aforesaid meeting of the Milspinmar directors."

(R. 99, Plaintiffs' Exhibit 1 and 2, R. 216, 218)

"8. On or about November 1, 1946, a bank account in the name of Milspinmar Corporation was opened with the State Bank of West Tampa (later called the Central Bank of Tampa). An initial deposit of $1,000.00 was made by Marsicano out of his personal funds. This sum, according to the minutes of the di-

---

[3]A finding of "ownership of property" is an appropriate finding of fact.

The finding of ownership, although subsidiary to the conclusion of law as to the results of that owership, is a finding of fact. "The statement of ownership, title or interest by the court as residing in any individual is a finding of ultimate fact and not a conclusion of law." *Bogan v. Hymes*, 65 F.2d 524 (C.A. 9, 1933). See also *Hall v. Commissioner*, 294 F.2d 82, 86 (C.A. 5, 1961) where the court held with respect to a finding by the Tax Court, "that the finding that Hall was the *owner* or in control of Spring Company was not so clearly erroneous as to require reversal by this Court". See also *Coosa Land Co. v. Commissioner*, 103 F.2d 555, 556 (C.A. 5, 1939), where the Court said: "The respondent . . . insists that all of the finding of which petitioner complains are findings of fact, and that each is supported by substantial evidence. We agree with respondent that this is so as to the findings . . . (2) that the taxpayer did not own the stock of Atlas Fertilizer Company . . ., and (3) that the taxpayer owned the stock in Southeastern Power & Light Company . . . and was taxable on the profits of the sale."

rectors' meeting of September 5, 1946, represented the beginning capital of the corporation, and was equivalent to the recited price of the 40 shares of capital stock (40 shares distributed among the co-owners in proportion to their ownership of the realty, at $25.00 a share). It was intended that this $1,000.00 be used toward payment of the estimated taxes and assessments which had accrued on the acquired property as of the time of purchase. This fund for payment of Taxes was designated as paid-in capital because the laws of the State of Florida required a corporation to have at least $500.00 as beginning capital. The other parties subsequently reimbursed Marsicano for their proportionate share of the deposit. Each of the four men were authorized to draw checks on the account. The $1,000.00 was, early in 1947, part of the funds used to pay the taxes accrued at the time of purchase, which exceeded $1,500.00."

(R. 108,109,111,115,211,220, 221; Plaintiffs' Exhibit 31)

"9. On or about December 12, 1956, some timber on the subject property was sold for $533.30. This amount was deposited in the bank account in the name of the Corporation, and, together with the above-mentioned $1,000.00, was shortly thereafter used to pay taxes."

(R. 115)

"10. In the spring of 1947, Spiner desired to partition his undivided one-fourth interest in the property, thereby acquiring an unfettered fee simple title to a specific quarter of the land. The parties conducted negotiations and reached an agreement with respect to the portion to be parceled to Spiner. On June 14, 1947, the partitioning agreement was implemented as follows:

The corporation, and the other parties individually, executed deeds to Spiner covering the part of the land he was to receive, and Spiner individually executed a deed to all the other parties covering the remaining land which was to continue to be held in the name of the corporation. The individual deeds were exchanged in recognition of the personal, beneficial co-ownership of the land, to the exclusion of the corporation, as evidenced by the corporate resolution hereinabove described. Other adjustments were made to equalize the division, largely involving Spiner's taking over a mortgage on a sale of a part of the realty to one McMachin, which was occurring about the same time."

(R. 116, 120, Plaintiffs' Exhibit 9
R. 121, Plaintiffs' Exhibit 10
R. 123, 251, Defendant's Exhibit V
R. 252, 253, 256, 316, 386, 391)

"11. In the course of apportioning the land and preparing the legal descriptions for the deeds in connection with the partition agreement, Marsicano discovered that the Drainage District property description contained an error. As a result, a narrow strip of land had been omitted from the Drainage District conveyances, causing a separation of the northern portion of the tract from the whole. Upon investigation, Marsicano ascertained that the strip in question had reverted to Hillsborough County, and could be purchased for approximately $500.00. On or about September 26, 1947, a deed was issued by the County to the corporation covering the omitted strip, thus making the tract of land contiguous as it was thought to be from the beginning. The co-owners considered this acquisition as tantamount to a clearing of title to the land originally acquired. There were no other acquisitions of any real

property with record title in the name of Milspinmar Corporation, except for a repurchase, in 1949, of some land sold to one Bidwell in 1948. Bidwell had asked to be relieved of his purchase. Miles individually paid the price to repurchase, and was later reimbursed by the others through a redistribution of proceeds from another transaction."

(R. 120,124,138,151,261,262,263, 264,265,266)

"12. Substantially all of the land was sold, a portion at a time, involving seven (7) purchasers, from 1948 to 1953; the bulk of the property was disposed of, however, in one transaction. In each case a deed was executed to the purchaser by Milspinmar Corporation, and the proceeds of the sale and subsequent payments on purchase money mortgages were deposited in the bank account carried in the name of Milspinmar Corporation. Also in each case, however, the proceeds were promptly disbursed, first to pay incidental expenses, including those of the particular transaction and taxes on the land held, and the remainder distributed to the individual plaintiffs according to their proportionate or fractional interests. The ownership by the individuals was opened and notorious, was disclosed to purchasers or known to them, and was not kept secret."

(R. 125, 130, Plaintiffs' Exhibit 15, R. 134-135, Plaintiffs' Exhibit 16, R. 136, Plaintiffs' Exhibit 16,

R. 140-141, Plaintiffs' Exhibit 19,
R. 150, Plaintiffs' Exhibit 20,
R. 151, Plaintiffs' Exhibit 20,
R. 153, Plaintiffs' Exhibit 21,
R. 154-155, Plaintiffs' Exhibit 22,
R. 167, Plaintiffs' Exhibit 29,
R. 157, Plaintiffs' Exhibit 23
R. 169, Plaintiffs' Exhibit 30,
R. 164, Plaintiffs' Exhibit 32,
R. 175, Plaintiffs' Exhibit 34,
R. 181, Plaintiffs' Exhibit 35,
R. 183, Plaintiffs' Exhibit 37,
R. 184, Plaintiffs' Exhibit 38;
R. 187, Plaintiffs' Exhibit 40,
R. 189, Plaintiffs' Exhibit 43,
R. 190, Plaintiffs' Exhibit 44,
R. 191, Plaintiffs' Exhibit 45,
R. 158, Plaintiffs' Exhibit 23,
R. 167,
R. 169, Plaintiffs' Exhibit 30,
R. 174, Plaintiffs' Exhibit 32,
R. 175, Plaintiffs' Exhibits 33, 34,
R. 181, Plaintiffs' Exhibit 35,
R. 183, Plaintiffs' Exhibit 37,
R. 184, Plaintiffs' Exhibits 37, 38, 39,
R. 187, Plaintiffs' Exhibit 40,
R. 188, Plaintiffs' Exhibit 42,
R. 189, Plaintiffs' Exhibit 43,
R. 190, Plaintiffs' Exhibit 44,
R. 191, Plaintiffs' Exhibit 45,
R. 160, Plaintiffs' Exhibit 24,
R. 161, Plaintiffs' Exhibit 25,
R. 162, Plaintiffs' Exhibit 26,

R. 165, 166, Plaintiffs' Exhibits 27, 28, R. 180, Plaintiffs' Exhibit 35, R. 181, Plaintiffs' Exhibit 36.)

"13. The above mentioned transactions, as reflected in the flow of proceeds in and out of the bank account carried in the name of Milspinmar Corporation may be briefly summarized as follows:

(a) Sources of funds: Except for deposits involved in balancing the co-owners' accounts and similar internal transactions, all funds deposited over the period of more than seven years arose out of 7 sales of portions of the realty (including the 1947 McMachin sale, considered part of the Spiner division) and the 1946 sale of timber, referred to above.

(b) Disposition of funds over 7 year period, 1946-1953:

	TOTAL AMOUNT
(1) County, Drainage District, fire control and other property taxes	$ 10,130.73
(2) Abstracts, title insurance, surveys and other related expenses of disposition of property, including expense of cancellation of one sale and reacquisition of property from purchaser, and commissions paid purchasers' brokers by the sellers	9,569.33
(3) State of Florida capital stock tax	68.33

(4) Gratuities to Marsicano's secretary, miscellaneous clerical work	600.00
(5) Distributions to individual beneficial owners	142,547.05
Total	$162,941.72

(Summary of varied exhibits in finding number 12. Also Plaintiffs' Exhibit 47 and 48.)

"14. None of the property held in the name of Milspinmar Corporation was ever improved or developed; none was ever rented; no property was ever subdivided; there was never any mortgage assumed in the corporate name, nor was any money borrowed by the corporation; the corporation never realized any revenue from any source whatsoever. The net proceeds from the sale of the land (and the one timber transaction, a part of the land) were held by it only momentarily, and then promptly distributed to the co-owners or at their direction. The corporation had no manager and no office; it had neither active officers nor employees, and it paid no salaries or wages. The corporation complied with the laws of the State of Florida sufficiently to maintain its corporate existence; but after the first meeting of September 5, 1946, it held no formal meetings, elected no officers (even when L. H. Spiner's interest in the property was divided out in 1947, and his name "vice-president" was scratched out on the bank signature card), engaged in no transaction unrelated to the property or the proceeds thereof belonging to the individual co-owners, nor in any other respect did it function as an active business corporation."

(R. 111-112, 198,211,214,221,222,223,224,229,240, 304,305,306,307,308,309,313,314,317,318,322,401, 405-407)

"15. The corporation owned no property, received no income, never received funds in which it had any beneficial interest or which it had any right to retain or against which it had any legal or equitable claim."

(See explanation at footnote 3)

"16. All of the plaintiffs considered the receipts from all sales of property as their personal income and so reported it on their personal income tax returns. The corporation filed no tax returns and, of course, paid no tax."

(R. 311, 447, 448, 451)

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE APPELLATE COURT EVINCES A CLEAR MISUNDERSTANDING, AND A CONSEQUENT ERRONEOUS APPLICATION, OF PREVIOUS OPINIONS OF THIS COURT.

The Court below squarely predicated its holding on its interpretation of statements previously made by this Court in the decision in *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943) (Record 538).

This Court's opinion in *Moline* neither dealt with the same factual situation, as found in the instant case, nor did the Court even discuss any contention of a taxpayer, or finding of a trial court, that a corporation should not be taxed on transactions in property which the corporation did not own. The taxpayer's argument in *Moline* was that the corporation was not liable for tax because, based on the doctrine of "piercing the cor-

porate veil", there was only one shareholder. That this was the substance of taxpayer's contention in *Moline* is vividly demonstrated by this Court's subsequent opinion in *Natoinal Carbide Corporation v. Commissioner*, 336 U.S. 422 (1949):

> "Complete ownership of the corporation and the control primarily dependent upon such ownership . . . are no longer of significance in determining taxability . . . . (Opinion P. 429)
>
> "In both [Moline and Burnet v. Commonwealth Improvement Co., 287 U.S. 415] we found that the contention that the corporation was the agent of its owner was *simply the argument that the subsidiary had no corporate identity distinct f om its stockholders in a different form.* (Opinion P. 429) (emphasis added)
>
> "Undoubtedly the great majority of corporations owned by sole stockholders are *'dummies' in the sense that their policies and day-to-day activities are determined not as decisions of the corporations but by their owners acting individually."* (Opinion P. 433) (Emphasis added)

This was not the basis of the decision of the trial judge in this case. As the trial court found, before *Moline* can be applied, the corporation must own property from which is derived the income sought to be taxed; and Milspinmar owned no such property.[4]

---

[4]That the government has accepted the proposition that taxation must follow ownership is made clear in its argument on the *Moline Properties* case itself. In that case, the government's brief (p.p. 28-29) specifically distinguished several lower court cases on the ground that the corporation in those cases was held non-taxable on the theory of *equitable ownership* of the property by others.

Section 13(b) (1939 Code) imposes a tax "upon the normal-tax net income *of* every corporation" (Emphasis added). Section 15(b) imposes the surtax in a like manner.

"Of" is the key word. In *Poe v. Seaborn*, 282 U.S. 101, this Court, in an unanimous opinion, construed the identical language imposing the tax on individuals:

> "The use of the word 'of' *denotes ownership.* It would be a strained construction which, in the absence of further definition by Congress, should impute a broader significance to the phrase." (Opinion at P. 109). (Emphasis added)

> "The Commissioner concedes that the *answer* to the question involved in the cause *must be found in the provisions of the law of the state,* as to a wife's ownership of or interest in community property." (Opinion at P. 110) (Emphasis added).

The appellate court, in the instant case, found that a corporation could be taxed on transactions in property which it did not own, and based that finding on *Moline,*[5] (Record P. 539). That such a holding misconstrues *Moline* is made abundantly clear by the opinion in *National Carbide Corporation,* which dealt with,

> "Assets of considerable value, *to which title was held by the subsidiaries* . . . . " (Opinion at P. 434) (Emphasis added).

---

[5]If the appellate court is correct in this interpretation, an anomalous situation is created. If naked title is in an "individual" trustee, the income is taxed to the beneficial owners. On the other hand, if naked title is in a "corporate" trustee, the income is taxed to the trustee. The Internal Revenue Code makes no such distinction. See, e.g. Section 162 (b), Internal Revenue Code of 1939.

"What we have said *does not foreclose a true corporate agent or trustee* from handling the property and income of its owner-principal without being taxable therefor. (Opinion P. 437) (Emphasis added).

"Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal and whether receipt of income is attributable to the services of employees of the principal and *to assets belonging to the principal* are some of the relevant considerations in determining whether a true agency exists. *If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of normal duties of an agent."* (Opinion P. 437) (Emphasis added).

As a predicate for its refusal to recognize this ownership concept as limiting *Moline*, the appellate court (Record P. 539-540) set forth the portion of the *National Carbide* case which noted that this Court:

" . . . reversed the Board of Tax Appeals in Moline Properties *in the face of its findings that 'full beneficial ownership was in Thompson* [*the sole stockholder*] *who continued to manage and regard the property as his own individually.'"* (Emphasis is the appellate court's)

Whether this Court would today follow the literal implications of that statement (see *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 4 L.ed.2d 1218, discussed later in this brief), is somewhat beside the point, because it is clear that, as used in the context of that decision, neither the words "findings" nor "full beneficial ownership" were intended to have the context placed on them by the appellate court.

A review of the Tax Court's opinion in *Moline* (then the Board of Tax Appeals) makes it clear that the "finding" of "full beneficial ownership" was not part of that Court's findings of facts. As therein used by the Board, the phrase "full beneficial ownership" was not intended to mean actual, complete ownership, nor even "equitable title," but referred only to the argument relative to the common identity between the shareholder and his wholly owned corporation. That this Court construed that "finding" of beneficial ownership as co-equal with common identity is made clear by a review of the entire paragraph from *National Carbide* wherein the previous quote is found.[6] This is further cemented by this Court's citation in *National Carbide* of *Stewart Forshay*, 20 B.T.A. 537, as a case to be distinguished from *Moline* (at page 438 in 336 U.S.).

Manifestly, therefore, the appellate court has placed a gloss on *Moline Properties* and *National Carbide* which was not intended by this Court and, indeed, was specifically rejected. The appellate court's opinion announces the doctrine that any corporation which is formed is *per se* to be taxed on all transactions carried out in its name without regard to whether or not it owns the property from which the taxable income is derived.

---

[6] "So far as control is concerned, we can see no difference in principle between Airco's [sole shareholder of the corporation] control of petitioners and that exercised over Moline Properties, Inc., by its sole stockholder. Undoubtedly, the great majority of corporations owned by sole stockholders are "dummies" in the sense that their policies and day-to-day activities are determined not as decisions of the corporations but by their owners acting individually. We can see no significance therefore, in findings of fact such as, "The Airco board held regular meetings and exercised complete domination and control over the business of Airco and each of the petitioners," ... We reversed the Board of Tax Appeals in Moline Properties in the face of its finding [full beneficial ownership in the sole stockholder]." (Opinion P. 433, 434)

This Court has never so held. If corporations are to be taxed on some theory of "ownership" other than that applied to individuals and of common understanding, the Congress should clearly so state.

II. THE HOLDING OF THE APPELLATE COURT TOTALLY DISREGARDED CERTAIN JUDICIAL GUIDELINES SET DOWN BY THIS COURT FOR REVIEW OF CASES BY CIRCUIT COURTS OF APPEAL.

Under Rule 52 of the Federal Rules of Civil Procedure, an appellate court is bound by the trial court's findings of facts unless such findings are "clearly erroneous".

Yet, the appellate court herein both directly and indirectly reversed or disregarded the following findings of the trial court:

1. The ownership by the individuals was open and notorious, was disclosed to purchasers or known to them and was not kept secret. (Finding Number 12, Record P. 415).

2. None of the property held in the name of Milspinmar Corporation was ever improved or developed; none was ever rented; no property was ever subdivided; there was never any mortgage assumed in the corporate name, nor was any money borrowed by the corporation; the corporation never realized any revenue from any source whatsoever. The net proceeds from the sale of the land (and the one timber transaction, a part of the land) were held by it only momentarily, and then promptly distributed to

the co-owners or at their direction. The corporation had no manager and no office; it had neither active officers nor employees, and it paid no salaries or wages. The corporation complied with the laws of the State of Florida sufficiently to maintain its corporate existence; but after the first meeting of September 5, 1946, it held no formal meetings, elected no officers (even when L. H. Spiner's interest in the property was divided out in 1947, and his name "vice-president" was scratched out on the bank signature card), engaged in no transactions unrelated to the property or the proceeds thereof belonging to the individual co-owners, nor in any other respect did it function as an active business corporation. (Finding Number 14, Record P.P. 416-417).

3. The corporation owned no property, received no income, never received funds in which it had any beneficial interest or which it had any right to retain or against which it had any legal or equitable claim.
(Finding Number 15, Record P. 417).

It is submitted, therefore, that the Appellate Court's opinion and decision is in conflict with the decision of this Court in *Commissioner of Internal Revenue v. Duberstein,* 363 U.S. 278, 289 - 293, 4 L.ed.2d 1218, 1227-1229 (1960).

It is further in conflict with that decision as it has been interpreted and applied in such cases as *Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co.,* 281 F.2d 646 (C.A. 6, 1960).

III. THE HOLDING OF THE APPELLATE COURT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Subsequent to this Court's decision in *Moline*, the Second Circuit had before it, *Paymer v. Commissioner*, 150 F.2d 334 (C.A. 2, 1949).[7]

In that case, the Paymers were two brothers in partnership with each other. Part of the partnership property consisted of improved real estate. To avoid the possibility that this partnership property would be attached by creditors,[8] the brothers organized Raymep Realty Corporation, Inc. (hereinafter referred to as Raymep) and Westrich Realty Corporation (hereinafter referred to as Westrich). The minutes of the meeting of each corporation held about the time the property was deeded contained a statement somewhat weaker than the one found in the instant case:[9]

> "The said conveyance was and is made with the express understanding that the corporation is only to hold title to the property, the beneficial interest and profits to be in the individual stockholders and the management and control of the property to be exclusively theirs. It is understood and agreed that this corporation was only organized for the convenience of the shareholders in the management thereof." (Opinion at P. 336)

---

[7] Actually four cases were consolidated: *Paymer v. Commissioner* (two cases), *Westrich Realty Corporation, et al, v. Commissioner*, *Raymep Realty Corporation, Inc. v. Commissioner*.

[8] To be compared, in the instant case, with the appellate court's attaching importance to the "alleged", but gratuitously found, fact that the shareholders derived benefit from Milspinmar because "no dower rights would attach to the wives of the three married parties to the transaction." (Record P. 537)

[9] See Record P. 412.

The Second Circuit held that Raymep was to be recognized for tax purposes because the corporation had borrowed $50,000.00 and had assigned, as part security, all of the lessor's rights, profits, and interest in two leases on the property. Furthermore, Raymep covenanted that it was the sole lessor, despite the fact the leases had not been assigned to it.

On the other hand the Court did not recognize Westrich as a taxable entity:

> "Westrich . . . was at all times but a passive dummy which did nothing but take and hold the title to the real estate conveyed to it. It served no business purpose in connection with the property and was intended to serve only as a blind to deter the creditors of one of the partners. It was but a sham to be disregarded for tax purposes . . . . " (Opinion P. 337)

That *Paymer* is still good law in the Second Circuit is made clear by that Court's opinion in *Commissioner v. State-Adams Corporation*, 283 F.2d 395 (C.A. 2, 1960):

> "We think that respondent having full beneficial ownership of the land and collecting the rent therefrom engaged in business . . . . *This is not a case where the corporation was a mere nominee, powerless to act with respect to the land other than with consent of the beneficial owners* . . . . This is *not a case where income belonging to the shareholders was received in form by the corporation. The income belonged to the corporation* . . . .
>
> "Respondent relies chiefly on Paymer . . . . There title to certain real estate was conveyed to . . . Westrich . . . . The conveyance was made 'with the express understanding that the corporation [was] only to hold title to the property, the beneficial

> interest and profits to be in the individual stockholders and the management and control of the property exclusively theirs.' . . . *Here respondent was the complete beneficial owner of the property and the lease* . . . . In reality *Paymer is nothing more than a restatement of the fundamental rule that income from real estate held in the name of the nominee will be taxed to the beneficial owner, not to the nominee.*" (Opinion P.P. 397-398) (Emphasis added)

See also *Jackson v. Commissioner of Internal Revenue*, 233 F.2d 289 (C.A. 2, 1956)

Clearly then the appellate court's reversal here, in the face of its acknowledging full beneficial ownership of the property in the shareholders, (Record 538-539) places it squarely in conflict with the Second Circuit Court of Appeals.

IV. THE APPELLATE COURT'S OPINION, BECAUSE IN DIRECT CONFLICT WITH THE TAX COURT'S HOLDINGS IN SIMILAR CASES, PRECLUDES UNIFORM ADMINISTRATION OF THE TAX LAWS.

The Court below specifically recognized the multitude of Tax Court cases, many decided subsequent to this Court's decision in *Moline*, which sustain and support petitioners' theory of the case and the trial judge's findings and conclusions. (Record 540-541). Despite this recognition, the appellate court felt that "the gloss which *National Carbide Corporation v. Commissioner*, . . . , has placed on the *Moline* . . . case" demanded reversal of the District Court. (Record 541).

Yet, a reading of *National Carbide* demonstrates that this Court impliedly recognized the Tax Court's decisions in this area but distinguished (not overruled!!) them from the *Moline* and *National Carbide* cases:

> " . . . See Moline Properties v. Commissioner . . . . Compare Forshay v. Commissioner, 20 B.T.A. (F) 537 (1930) . . . . When we referred to the "usual incidents of an agency relationship" in the Moline Properties Case, we meant just that — not the identity of ownership and control disclosed by the facts of this case." *National Carbide*, 336 U.S. 422, 438, 439.

That *Forshay* (which was decided before Moline) is a case involving the "usual incidents of [an] agency relationship" averred to in *National Carbide* is demonstrated by a portion of the Tax Court's opinion:

> " . . . Considering all the acts of the parties, as evidenced by their covenants and agreements as limitations upon the instruments of conveyance, *it is clearly evident the corporation did not take title on its own behalf or for its own benefit, but for the benefit of petitioner and the Fergusons. It held only the bare record title, coupled perhaps with a power to sell, convey, lease, mortgage, or otherwise deal with such property for their benefit only upon a* written direction from a majority of them . . . .
>
> " . . . Whether the conveyance of the property here in question to the A. T. Seventh Corporation created a passive trust, a power in trust, or a mere agency is not material. *In either case no estate or interest vested in the corporation, but the parties entitled to the beneficial interest took both the legal and equitable title as tenants in common . . . . Any income from the property was properly that of petitioner and his cotenants, as was also the amount received upon the sale. Such amounts were proper-*

> *ly reported as income by the individuals, rather than the corporation."* Stewart Forshay, 20 B.T.A. 537, 548, 549 (Emphasis added)

The trial judge's findings in the instant case, as to ownership of the land, which the appellate court "evidentally" accepted, but thought not applicable, amply demonstrates that the facts in the instant case are on "all fours" with the *Forshay* case.

Following *Forshay*, but still before *Moline*, the Tax Court decided *Moro Realty Holding Corporation*, 25 B.T.A. 1135 (1932):

> *"The proceeds of the sale were paid to the corporation* and by it distributed to the individual syndicate members in accordance with two supplemental agreements entered into by the syndicate members on May 1, 1923. . . .
>
> "The entire transaction was financed by contributions of the syndicate members or by borrowings on their indorsement. *On sale of the property the corporation acted only as a conduit for the members. "The income from the sale of the property was income to those entitled to the beneficial interest, the real owners of the property, and distributable to them in accordance with the syndicate agreement as modified.* Theirs is the tax liability. The petitioning corporation derived no income from such sale and has no tax liability on account thereof.
>
> "The question presented is not new. It was fully considered in Stewart Forshay, 20 B.T.A. 537, ..." (Opinion 1143, 1146) (Emphasis added)

The *Moro* case is all the more interesting because in 1947-1 Cumulative Bulletin 3, *after this Court's decision in Moline*, the Commissioner acquiesced. For other Tax Court cases which sustain petitioners' position see: *Industrial Union Oil Co.*, 5 T.C.M. 879, (distinguishing Moline); *Worth Steamship Corporation*, 7 T.C. 654 (1946) (distinguishing *Moline*); *K. C. Land Co., Inc.*,

19 T.C.M. 183 (1960) (involving a Florida title holding corporation similar to the one in the instant case); *Julius Callmer*, 19 T.C.M. 435 (1960); *Park Lane Apartments, Inc.*, 1940 B.T.A. Memo Decisions, par 40,398;[10] and *John A. Mulligan*, 16 T.C. 1489 (1951).

Manifestly, the Tax Court when faced with a factual situation similar to the one found in the instant case would follow the opinion of the District Court rather than the appellate court.

It is respectfully submitted that desirability for uniform administration of the tax laws requires that this Court grant our petition in this case. Review is especially pertinent when this desirability combines with the great weight historically afforded by this Court to Tax Court decisions:

> "The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer . . . .
>
> *"Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts.*
>
> "The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. *While its decisions may not be binding precedents for courts* dealing with similar problems, *uniform administration would be promoted by conforming to them where possible.*" *Dobson v. Commissioner*, 320 U.S. 489, 499, 502 (1943) (Emphasis added).

[10] Wherein the Court specifically recognized "[I]t is a frequent practice in Florida to place the record title in a bank or other trustee and establish a trust status relating to such property without referring to the trust relationship."

SUMMARY

The appellate court never demonstrated where a single trial court finding was not supported by the record. Accepting the trial judge's concept of the case, Milspinmar had neither property nor transactions on which it could be taxed.

The co-owners formed Milspinmar to serve as a mere nominal holder of naked record title. Did the co-owners act inconsistently with this original intention? They did not. They never gave Milspinmar authority to borrow money on the credit of their land (*Moline* and *Paymer* cases). Nor, did they ever permit the corporation to use their funds or property to perform business acts of its own (*National Carbide*). In essence, they never performed any act which could mislead anyone concerning Milspinmar's status.

The appellate court seeks to tax the corporation because " . . . that *what was done by Milspinmar Corporation* . . . [is] the "equivalent of business activity" and amount to "the carrying on of business by the corporation." (Record P. 540) (Emphasis added). But this Court has announced that it was not its intent to "foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor." *National Carbide*, supra, (Opinion P. 437). Thus, as noted by one eminent tax authority,[11] the previous holdings of this Court do not support the theory that business activity is inconsistent with an agency relationship between the corporation and its shareholders. If the corporation, as here, merely holds naked title to the property and

---

[11] *Bittker, Federal Income Taxation of Corporations and Shareholders*, P. 35.

the management functions are carried on by the shareholders, it is clear that the corporation is a mere agent or nominee and, hence, is not to be taxed.

The latter result is not reached on a theory of "disregarding the corporate entity" but, rather, is the same result which would be reached if, instead of Milspinmar, an individual, estate, trust or partnership were acting as agent or nominee.

This Court has previously condemned, and rightfully so, the use of artful tax devices, by a favored few, to provide tax havens or shelters and to secure a consequent position of advantage over their fellow taxpayers. *Knetsch v. United States*, 364 U.S. 361 (1960); See also, *Blum*, 40 Taxes, The Tax Magazine, P. 296, April 1962. The Appellate Court's opinion in this case, however, did not frustrate an artful tax device. Rather, it converted an ordinary and well recognized device of business convenience[12] into a tax trap.

---

[12]There are "hundreds" of such corporate holders of record title in Florida. *Kay v. Key West Development Co., et al*, 72 So.2d 786,787,788 (Fla. 1954).

CONCLUSION

The four reasons discussed above clearly demonstrate that the granting of the Writ of Certiorari in this case will allow the Court an opportunity to achieve uniform interpretation of the tax laws rather than the incongruous interpretation which now exists between this Court, the Court of Appeals for the Second Circuit and the Tax Court, on the one hand, and the Court of Appeals for the Fifth Circuit, on the other.

Furthermore, petitioners would suggest to the Court that the appellate court's misreading of *Moline* and *National Carbide* is sufficient ground for the immediate reversal of the appellate court's decision in this case. See *James L. Swafford v. Atlantic Coast Line Railroad Company, Beatrice A. Anderson v. Atlantic Coast Line Railroad Co.*, 350 U.S. 807, 1006 L.ed. 725 (1955).

We respectfully pray the Court to grant this our petition for Writ of Certiorari, issue the Writ, and reverse the decision entered in this cause by the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE W. ERICKSEN

Of MACFARLANE, FERGUSON, ALLISON & KELLY
605 Franklin Street
P. O. Box 1531
Tampa 1, Florida

Attorneys for Petitioners

AFFIDAVIT OF SERVICE

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH:

BEFORE ME, the undersigned authority, this day personally appeared GEORGE W. ERICKSEN, who being first duly sworn, says that he is counsel for the Petitioners in this cause, and that he did furnish copies of the foregoing Petition for a Writ of Certiorari to ARCHIBALD COX, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and LOUIS F. OBERDORFER, Assistant Attorney General of the United States, Department of Justice, Washington 25, D. C., by *Air Mail*, and to EDWARD F. BOARDMAN, United States Attorney, 409 Federal Building, Tampa, Florida, in an envelope addressed to said attorneys as aforesaid with sufficient United States postage thereon to insure delivery, on the ..... day of July, 1963.

.....

GEORGE W. ERICKSEN

Sworn to and subscribed before me, this ..... day of July, 1963.

.....

Notary Public, State of Florida at Large

My Commission expires:

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19323

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA,

Appellant,

versus

W. M. MILES and EDITH P. MILES, his wife; H. E. PONTIUS and LOVINA B. PONTIUS, his wife; and RALPH A. MARSICANO and MARIE B. MARSICANO, his wife,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(April 29, 1963)

Before TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal by the District Director of Internal Revenue from an adverse judgment which permitted the appellee-taxpayers to recover taxes

which they had paid as transferees of their corporation, Milspinmar Corporation. The action, therefore, deals with the question whether the corporation was subject to the income taxes representing the gain on the sales of property for the years 1950, 51, 52 and 53.

The facts are not essentially in dispute. In 1946 four individuals, the above named husbands together with an unmarried associate, Louis Spiner, desired to buy some land from a local Drainage District, the purchase price being $9800. This amount was paid by each of them giving his check for $2500, less $200 which Marsicano gave for the purpose of "paying for title insurance, some recording fees and little incidental expenses." Before the deed was received, Milspinmar Corporation was formed. The purpose for the forming of the corporation can be taken to be that asserted by the appellees in their belief as quoted from the language of Marsicano, the lawyer, as follows:

> "We arrived at the conclusion of what was the best way to take the title so that the seven beneficial owners would not be hampered with a multiplicity of signatures and a lot of complexities in the event we sold the property." " . . . the thing that I was concerned with was trying to get seven people owning a piece of property together; to try to get them all together to sign a contract or a deed or something like that, is really a problem."

The corporate formalities were completed on August 19, 1946. On September 5th the first and only formal meeting of the Board of Directors was held. At this time the following Resolution was adopted:

"WHEREAS, W. M. Miles, Edith P. Miles, Louis H. Spiner, Ralph A. Marsicano, Marie Brinker Marsicano, H. E. Pontius and Lovina B. Pontius, have agreed with and paid to the Southwest Tampa Storm Sewer Drainage District, a corporation organized and existing under the Laws of the State of Florida, situate in Hillsborough County, Florida the amount of Nine thousand eight hundred ($9,800.00) Dollars, as full consideration for the purchase price of the following described property situate in Hillsborough County, Florida, to-wit:

[Legal description omitted]

"said property to be owned by the said parties in the respective interest to-wit: W. M. Miles 1/8; Edith P. Miles 1/8; Louis H. Spiner 1/4; Ralph A. Marsicano 1/8; Marie Brinker Marsicano 1/8; H. E. Pontius 1/8; and Lovina B. Pontius 1/8, and,

"WHEREAS, the said purchasers desire to have the title to said property conveyed to Milspinmar Corporation for the use and benefit of said purchasers in order to facilitate the payment of ad valorem and drainage district taxes and to expedite the conveyance of all or any part of said property as the same may be sold. Now, Therefore,

"BE IT RESOLVED BY THE BOARD OF DIRECTORS OF MILSPINMAR CORPORATION:

"(a) That the above described property shall be

conveyed by the said Southwest Tampa Storm Sewer Drainage District, a corporation, to Milspinmar Corporation, and the deed or deeds conveying said property shall be accepted and the title held by Milspinmar Corporation for the use and benefit of the aforesaid beneficial owners according to the interests set forth, for the purpose of facilitating the payment of taxes and to expedite the conveyance of any or all of said property.

"(b) That the Corporation shall convey by good and sufficient deed, all or any part of the above described property to such grantees as the said beneficial owners above named may from time to time designate.

"(c) That the Secretary of this Corporation shall issue to each of the aforementioned beneficial owners, a certified copy of this Resolution as evidence of their ownership and interest in the above described property."

Thereupon the deed was received from the Drainage District and filed for record.

The Minutes of the September 5th meeting also show the following:

"The Secretary and Treasurer announced that he had on hand the amount of $1,000.00 in full payment of all of the capital stock of the Corporation, and that such amount represented the amount of

capital with which the Corporation would begin business.

> "Upon motion duly made, seconded and unanimously carried the Secretary and Treasurer was directed to deposit the full amount of said capital of the Corporation in the name of the Corporation at the new State Bank of West Tampa, Tampa, Florida, which would open on November 1, 1946, and that checks would be drawn on said account in the name of the Corporation when signed by the Secretary-Treasurer and counter-signed by anyone of the other officers."

It appears that Mr. Marsicano advanced the $1000 with which the bank account was opened. This money was used to pay outstanding ad valorem and Drainage District Assessments. Subsequently, on November 1st and December 12th, 1946, the corporation received $533.30 representing the proceeds from the sale of timber off the lands. This money was also used to pay the taxes and drainage assessments, which, as it was stated, were a little more than $1500.

In 1947, Spiner wished to get his part of the property out and the parties reached an agreement with respect to the portion to be parceled to Spiner. He received a part of the land and gave his deed to the other stockholders and transferred his stock in the corporation to the other stockholders as well. Spiner also received an assignment of a purchase money mortgage representing his share of such assets then held in the corporation's name.

The corporation sold off pieces of its real estate in seven separate transactions, in one of which it repurchased a piece of land it had sold to one Bidwell in 1948.[1] Also the corporation executed assignments, satisfactions and partial releases of mortgages which were secured as partial payment when the sales were made.

We think it clear that without dispute these individuals elected for purposes of their own to cause title of this property to be placed in the corporate name, and for it to be dealt with for their benefit in such manner as it would have to be dealt with so long as the corporation appeared to be the record title holder of the property. The benefits of such an arrangement are obvious. In the first place, no dower rights would attach to the wives of the three married parties to the transaction. In the second place, in the event of the death of any member of the group no administration would be necessary in order to clear the title to the real estate. In the third place, sales could be made by an execution of an instrument signed by officers of the corporation rather than requiring seven signatures initially, or six signatures after Spiner got out. Also, any other documents necessary in completing transactions dealing with the sale of property, such as the releasing of mortgages on the property, the cancellation of security instru-

[1]While we use the language in the sense that the corporation did these things, we recognize that the appellees strongly urge that the corporation did none of them but that they were actually done by the stockholders of the corporation, the taxpayers here. We mean to indicate by the language used merely that, with title in the corporation, the documents were executed in the name of the corporation and security instruments were received in the name of the corporation, proceeds were placed in the corporation's bank accounts and checks were issued in the name of the corporation. These activities engaged in in the name of the corporation were actually carried out by persons named as officers of the corporation.

ments when full payment was completed, the execution of contracts for sale all would be facilitated. Finally, by the maintenance of a corporate bank account in which all funds were initially deposited, current payments of taxes, fees and the like could be made and all the excess could be immediately paid out to the individuals.

The taxpayers contend that the effect of this arrangement was to create the corporation as a naked trustee of title for the taxpayers who were the beneficial owners and, under the Florida law of trusts, also the legal owners of the property. The Government, on the contrary, contends that, having elected to have the transaction handled in corporate form, the corporation may not be excused from reporting the transactions resulting in a profit as its own profit, and paying taxes on this income entirely separately from the tax obligations of the individual taxpayers who were really stockholders of the corporation. The answer to this question is to be found by placing the facts of this case against the formula announced by the United States Supreme Court in *Moline Properties v Commissioner of Internal Revenue*, 319 U. S. 436, where, at page 438, the Court said:

> "The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation (citing cases) or to avoid (citing cases) or to comply with (citing cases) the demands of creditors or to serve the creator's personal or undisclosed convenience, (citing cases) *so long as that purpose is the equivalent of business activity or is followed by the carrying on of busi-*

ness by the corporation, the corporation remains a separate taxable entity. New Colonial Co. v. Helvering, 292 U. S. 435; *Deputy v. duPont*, 308 U. S. 488." (Emphasis Added.)

On the surface of it there would hardly seem to be any doubt but that this corporation had the purpose "to serve the creator's personal or undisclosed convenience" and that this was "followed by the carrying on of business of the corporation." The taxpayers take the position that the mere carrying on of business by the corporation, to satisfy this requirement of the Moline Properties case, must be business relating to property to which it has title, either legal of equitable. They contend that this corporation was the holder of a mere naked record title with neither legal nor equitable ownership of the property and that therefore such business as was carried on by the corporation does not fall within the formula that is above set out. We find no such limitation in the formula adopted by the Supreme Court in the Moline Properties case. That no such limitation is intended is made clear by the Court's subsequent opinion in *National Carbide Corporation v. Commissioner of Internal Revenue*, 336 U. S. 422. The Court there expressly called attention to its holding in the Moline Properties case, notwithstanding the findings of the Tax Court that *full beneficial ownership* of the property there involved was in the sole stockholder. The Court said:

"Undoubtedly the great majority of corporations owned by sole stockholders are 'dummies' in the sense that their policies and day-to-day activities are determined not as decisions of the corporation but by their owners acting individually. . . . We

reversed the Board of Tax Appeals in Moline Properties *in the face of its findings that 'Full beneficial ownership was in Thompson [the sole stockholder] who continued to manage and regard the property as his own individually.'*" (Emphasis added.)

While it is true, of course, that it is highly unlikely that in any two situations the activities and conduct in the name of the corporation will be the same, we think it cannot be gainsaid that what was done by Milspinmar Corporation in the acquisition and recording of title to the land in question, the surveying of the land, the paying of taxes on it, the searching of titles, the sale of timber from it, the negotiation of contracts for its sale in different parcels, its actual sale, its receipt of purchase money security deeds, its release of these security deeds and its satisfaction of these deeds of record, together with the other activities naturally flowing from these transactions, such as the reacquisition of a tract from one purchaser, the acquisition of an additional tract in order to clear title, are the "equivalent of business activity," and amount to "the carrying on of business by the corporation." There can be no doubt but that the parties, when they initiated the corporate setup, had the purpose that these activities would be carried on and it is equally certain that they were actually carried on, thus meeting both of the alternative requirements quoted above from the Moline Properties case.

Taxpayers complain particularly of the lack of consistency on the part of the Commissioner of Internal Revenue in acquiescing in Moro Realty Holding Company, 25 B.T.A. 1135 and contesting the present case. The taxpayers also rely strongly on several Tax Court decisions, typical of

which is K. C. Land Co., Inc., 19 T.C.M. 183. It goes without saying that where the Supreme Court has clearly established legal principles in dealing with the subject matter in litigation, we look to these principles for guidance. They are controlling on us. Particularly in light of the gloss which *National Carbide Corporation v. Commissioner*, supra, has placed on the Moline Properties, Inc. case, we are unable to agree with the taxpayers here that their activities do not fall within the language of the formulation set down by the Supreme Court in the Moline Properties case.

The judgment of the trial court, finding that the corporate taxpayers owed no obligation for its own income taxes, was error. The judgment is, therefore, REVERSED and the case is REMANDED to the District Court for further proceedings not inconsistent with this opinion.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By [signature]
Deputy
New Orleans, Louisiana JUN 19 1963

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,323

D. C. Docket No. 3608-T-Civil

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA,

Appellant,

versus

W. M. MILES and EDITH MILES, his wife; H. E. PONTIUS and LOVINA B. PONTIUS, his wife; and RALPH A. MARSICANO and MARIE B. MARSICANO, his wife,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before Tuttle, Chief Judge, and Jones and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that tne judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, W. M. Miles and Edith P. Miles, his wife; H. E. Pontius and Lovina B. Pontius, his wife, and Ralph A. Marsicano and Marie B. Marsicano, his wife, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 29, 1963

Issued as Mandate:

Court Costs payable to Clerk, U. S. Court of Appeals, Fifth Circuit by Appellees:

Docketing cause, etc. . . . $25.00

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,323

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA,

Appellant,

v.

W. M. MILES and EDITH P. MILES, his wife; H. E. PONTIUS and LOVINA B. PONTIUS, his wife; and RALPH A. MARSICANO and MARIE B. MARSICANO, his wife,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(May 27, 1963)

ON PETITION FOR REHEARING EN BANC

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges. PER CURIAM:

It is ORDERED that the petition for rehearing en banc is DENIED. The petition for rehearing is DENIED.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Opinion presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	11
Appendix	12

CITATIONS

Cases:

Commissioner v. *State-Adams Corp.*, 283 F. 2d 395, certiorari denied, 365 U. S. 844	10
Gregg Co. of Delaware v. *Commissioner*, 239 F. 2d 498	10
Hagist Ranch, Inc. v. *Commissioner*, 295 F 2d 351	10
Moline Properties v. *Commissioner*, 319 U. S. 436	7, 8, 10
National Carbide Corp. v. *Commissioner*, 336 U. S. 422	9, 10
National Investors Corp. v. *Hoey*, 144 F. 2d 466	10
O'Neill v. *Commissioner*, 271 F. 2d 44	10
Paymer v. *Commissioner*, 150 F. 2d 334	9, 10
Skarda v. *Commissioner*, 250 F. 2d 429	10
Wattley v. *Commissioner*, 275 F. 2d 461	10
Whitfield's Estate v. *Commissioner*, 192 F. 2d 492	10

Statutes:

Internal Revenue Code of 1939:	
Sec. 13 (26 U.S.C. 1952 ed., Sec. 13)	2, 12
Sec. 15 (26 U.S.C. 1952 ed., Sec. 15)	2, 12
Sec. 22 (26 U.S.C. 1952 ed., Sec. 22)	2, 13
Sec. 52 (26 U.S.C. 1952 ed., Sec. 52)	2, 13

698 229—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 286

W. M. MILES, ET AL., PETITIONERS

v.

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The findings of fact and conclusions of law (R. 409–420) of the district court are not officially reported. The opinion of the court of appeals (Pet. 34–43) is reported at 316 F. 2d 710.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1963. (Pet. 44–45.) A petition for rehearing was denied on May 27, 1963. (Pet. 46.) The petition for a writ of certiorari was filed on July 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that a corporation which was formed for business reasons and which engaged in substantial business activities by acquiring, holding, managing, and selling real estate, was taxable as a corporate entity for federal income tax purposes.

STATUTES INVOLVED

Sections 13(b)(1) and (2), 15(b)(1) and (2), 22(a), and 52 of the Internal Revenue Code of 1939 are set forth in relevant part in the Appendix, pp. 12–13, *infra*.

STATEMENT

This was an action brought by the taxpayers (W. M. Miles and Edith P. Miles, his wife; H. E. Pontius and Lovina B. Pontius, his wife, and Ralph A. Marsicano and Marie B. Marsicano, his wife) for a refund of corporate income taxes which were assessed against and collected from them as transferees of the assets of the Milspinmar Corporation, in which they were the sole stockholders at the time of the assessment. The taxes were assessed with respect to the operations of Milspinmar during the calendar years 1950 through 1953, inclusive. (R. 2, 409.)

The formation of the corporation.—In 1946, Mr. Miles, Mr. Pontius, and Mr. Marsicano, together with an unmarried associate, Louis Spiner, desired to buy some land from a local Drainage District for $9,800. This amount was paid by checks from Miles, Pontius, and Spiner for $2,500 and a check from Marsicano for $2,300. Marsicano later paid $200 for title insur-

ance, recording fees and incidental expenses. Before the deed was received, the Milspinmar Corporation was formed. Marsicano, the group's lawyer, formed the corporation because of the problem of "trying to get seven people owning a piece of property together * * * to sign a contract or a deed or something like that * * *" and he concluded that forming the corporation "was the best way to take the title so that the seven beneficial owners would not be hampered with a multiplicity of signatures and a lot of complexities in the event we sold the property." (Pet. 35.)

The corporate formalities were completed on August 19, 1946. On September 5, 1946 the first and only formal meeting of the Board of Directors was held, although informal meetings were held yearly from 1946 through 1953 when business needs required. (R. 304–305; 308–309; Deft. Ex. 1–2.) At the time of the formal September, 1946, meeting a resolution was adopted reciting the purchase of the Drainage District property by the individual parties, their proportionate ownership thereof, and their desire and decision to take record title in the name of the new corporation for the use and benefit of the individual parties "in order to facilitate the payment of ad valorem and drainage district taxes and to expedite the conveyance of all or any part of the property as it might be sold. The resolution further provided that "the Corporation shall convey by good and sufficient deed, all or any part of the above described property to such grantees as the said beneficial owners above named may from time to time designate"

and that "the Secretary of this Corporation shall issue to each of the aforementioned beneficial owners, a certified copy of this Resolution as evidence of their ownership and interest in the * * * property." (Pet. 35–37.)

Pursuant to the above resolution a deed was received by Milspinmar from the Drainage District and filed for record. (Pet. 37.)

At the formal September, 1946, meeting the Secretary-Treasurer announced that "he had on hand the amount of $1,000.00 in full payment of all of the capital stock of the Corporation, and that such amount represented the amount of capital with which the Corporation would begin business." The Corporation directed that he should deposit "the full amount of said capital of the Corporation in the name of the Corporation at the new State Bank of West Tampa * * * and that checks would be drawn on said account in the name of the Corporation when signed by the Secretary-Treasurer and counter-signed by any one of the other officers." (Pet. 37–38.)

The Business Activities of the Corporation.—Pursuant to action taken at the September, 1946, meeting, the Corporation commenced conducting business in its own name as a separate entity. Mr. Marsicano advanced the $1,000 with which the Corporation bank account was opened. This money was used to pay outstanding ad valorem and Drainage District assessments. Subsequently, on November 1 and December 12, 1946, the Corporation received $733.30 representing the proceeds from the sale of timber off the lands. This money was also used to pay the taxes and drainage

assessments, which totalled a little more than $1500. (Pet. 38.)

In 1947, when Spiner wished to withdraw from the venture, the parties agreed to give him a particular portion of the property. He received part of the land, gave his deed to the other stockholders and transferred his stock in the Corporation to the other stockholders. Spiner also received an assignment of a purchase money mortgage representing his share of the assets then held in the Corporation's name. (Pet. 38.)

In 1947 the Corporation acquired an additional 10 acre tract of land for approximately $500 in order to connect up the northern portion of its original tract with the whole. (R. 261–262.) The Corporation sold pieces of its real estate in seven separate transactions, in one of which it repurchased a piece of land it had sold to one Bidwell in 1948. The documents for these transactions were executed in the name of the Corporation and security instruments were received in the Corporation's name. Proceeds were placed in the Corporation's bank account and checks were issued in the name of the Corporation. Also, the Corporation executed assignments, satisfactions and partial releases of mortgages which were obtained as partial payment when the sales were made. (Pet. 39.)

The proceeds from the foregoing timber sale, the real estate sales, and all interest which accrued and was paid on the debts secured by the purchase money mortgages taken by the Corporation, were received by Milspinnar and deposited in its bank account. This bank account was used to pay the expenses in-

curred by the Corporation. These expenses included survey expenses, clerical expenses, real estate taxes on corporate property, Drainage District assessments, title insurance, state capital stock taxes, and brokerage expenses. (R. 224–225, 232–238; Defts. Exs. K–P.) The Corporation from time to time would issue checks to the stockholders, usually in proportion to their stock interest in the corporation. These checks represented the proceeds from the various transactions Milspinmar entered into, after the payment of the foregoing expenses and the maintenance of a small balance in the account for corporate needs. (Supp. R. 28–30, Defts. Ex. L–2.) During the period from November 1, 1946, to December 31, 1953, there were 35 deposits made in Milspinmar's bank account totaling $161,000 and 101 checks drawn on this account. (Supp. R. 27, 30; Deft. Ex. L–2.)

Milspinmar never filed any federal income tax returns but it did file yearly Florida state corporate stock tax returns. In each of these returns, Milspinmar was described by its officers as being an "active" corporation. (R. 306–311; Deft. Ex. I–2.)

Taxpayers reported the gain realized on the sales of the Milspinmar real estate in their individual income tax returns. On examination of these returns the existence of Milspinmar was discovered, and the Commissioner treated the gain on sales of the real estate made during the period in question as taxable to the corporation and assessed deficiencies in accordance with this determination. Since the corporation had distributed all of its assets at the time that the exami-

nation was conducted, transferee assessments were made against the individual taxpayers. (R. 409.)

The taxpayers paid the assessments against them, filed timely claims for refund, and brought this action in the district court when the refund claims were disallowed. The district court found for the taxpayers. (R. 409–420.) The court of appeals reversed, holding that the corporation was taxable as a separate entity.

ARGUMENT

The decision of the court of appeals in this case is based on well-established principles of federal tax law. There are no conflicting decisions, and there is no reason for review by this Court. In essence, the case is one in which a closely held corporation, in its own name, performed numerous business transactions. The court of appeals was clearly correct in holding the corporation to be a taxable entity.

1. The taxpayers contend that the court of appeals has misconstrued and misapplied the holding of this Court in *Moline Properties* v. *Commissioner*, 319 U.S. 436. In *Moline* it was held (pp. 438–439) that "Whether the purpose [of the formation of a corporation] be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation the corporation remains a separate taxable entity."

In the case at bar it is perfectly clear from the record that Milspinmar was formed for a business purpose and it is equally clear that business activity was actually carried on by Milspinmar in its own name and for its own account, thereby fulfilling both of the alternative requirements of *Moline* for recognition of the corporation as a taxable entity. Milspinmar was originally chosen to hold title to the property because of the numerous difficulties which would have been involved in having the ownership divided among one individual and three married couples, and the facts show that the corporate entity was fully utilized in carrying on business activities. As the court of appeals found (Pet. 42):

> * * * it cannot be gainsaid that what was done by Milspinmar Corporation in the acquisition and recording of title to the land in question, the surveying of the land, the paying of taxes on it, the searching of titles, the sale of timber from it, the negotiation of contracts for its sale in different parcels, its actual sale, its receipt of purchase money security deeds, its release of these security deeds and its satisfaction of these deeds of record, together with the other activities naturally flowing from these transactions, such as the reacquisition of a tract from one purchaser, the acquisition of an additional tract in order to clear title, are the "equivalent of business activity," and amount to "the carrying on of business by the corporation." * * *

2. The district court held, and taxpayers now contend, that the corporation was not a taxable entity in this case because it acted as an agent. It is not disputed that the doctrine of *Moline Properties* v. *Com-*

missioner, supra, does not foreclose a corporation from acting in a true fiduciary or agency relationship with respect to property, without having the income from that property taxable to it. See *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 437–438. The corporation in this case, however, did not purport to act as a fiduciary or agent, but acted for itself. The ingredients of the alleged fiduciary relationship here were essentially the same as in any closely held corporation: the fact that the corporation was owned and controlled by its alleged principals or beneficiaries. These ingredients were not enough to make the corporation a true agent or fiduciary within the meaning of the *National Carbide* case, for as the Court there said, (336 U.S. at 437) "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent."

3. Contrary to taxpayers' contention, the decision below is not in conflict with *Paymer* v. *Commissioner*, 150 F. 2d 334 (C.A. 2). In *Paymer*, real estate which was owned by a partnership of two brothers was transferred to two separate corporations to protect the property from attachment by a creditor of one of the brothers. A stockholders' resolution was adopted which provided for retention by the stockholders of the beneficial interest in the property. One of the corporations did nothing with respect to the property it acquired, other than to hold it. The court of appeals held that this corporation was not an entity for tax purposes. The other corporation participated

in one transaction: Its name was used in connection with a $50,000 loan obtained upon the property. This one act was sufficient for the court, relying on *Moline Properties*, to find that the corporation was a taxable entity. See 150 F. 2d at 336–337. This aspect of the *Paymer* case confirms the correctness of the decision of the court of appeals in the present case.

The court of appeals decision here is in conformity with a line of cases holding that where a corporation is either formed for a business purpose or carries on business activity it may not be disregarded as an entity for tax purposes. *Moline Properties* v. *Commissioner, supra; National Carbide Corp.* v. *Commissioner, supra; Whitfield's Estate* v. *Commissioner*, 192 F. 2d 494 (C.A. 5); *Gregg Co. of Delaware* v. *Commissioner*, 239 F. 2d 498 (C.A. 2); *Skarda* v. *Commissioner*, 250 F. 2d 429 (C.A. 10); *O'Neill* v. *Commissioner*, 271 F. 2d 44 (C.A. 9); *Wattley* v. *Commissioner*, 275 F. 2d 461 (C.A. 2); *National Investors Corp.* v. *Hoey*, 144 F. 2d 466 (C.A. 2); *Commissioner* v. *State-Adams Corp.*, 283 F. 2d 395 (C.A. 2), certiorari denied, 365 U.S. 844; *Hagist Ranch, Inc.* v. *Commissioner*, 295 F. 2d 351 (C.A. 7).

4. Taxpayers' final contention is that the appellate court's decision cannot be squared with various decisions of the Tax Court, some of which were rendered after this Court's decisions in *Moline Properties* and *National Carbide*. Even if this be so, the present decision is in complete conformity with the uniform course of appellate judicial decisions, and, therefore, there is no conflict of decisions of the character which calls for this Court's review.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
ROBERT N. ANDERSON,
BERNARD J. SCHOENBERG,
Attorneys.

AUGUST 1963.

APPENDIX

INTERNAL REVENUE CODE OF 1939

SEC. 13[1] [As amended by 121 of the Revenue Act of 1950, c. 994, 64 Stat. 906]. NORMAL TAX ON CORPORATIONS.

* * * * * *

(b) IMPOSITION OF TAX.—

(1) TAXABLE YEARS BEGINNING AFTER JUNE 30, 1950.—In the case of taxable years beginning after June 30, 1950, there shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation * * *.

(2) CALENDAR YEAR 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the normal-tax net income of every corporation * * *.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 13.)

SEC. 15[2] [As added by Sec. 201 of the Revenue Act of 1940, c. 419, 54 Stat. 516, as amended by Sec. 104(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and as amended by Sec. 121(c) of the Revenue Act of 1950, *supra*]. SURTAX ON CORPORATIONS.

* * * * * *

(b) IMPOSITION OF TAX.—

(1). TAXABLE YEARS BEGINNING AFTER JUNE 30, 1950.—In the case of taxable years beginning after

[1] The amendment of this section by Section 121(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452, made no changes material to this case.

[2] The amendment of this section by Section 121(a) of the Revenue Act of 1951, *supra*, made no changes material to this case.

June 30, 1950, there shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation * * *.

(2) CALENDAR YEAR 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the corporation surtax net income of every corporation * * *.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 15.)

SEC. 22. GROSS INCOME.

(a) GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 52. CORPORATION RETURNS.

(a) REQUIREMENT.—Every corporation subject to taxation under this chapter shall make a return * * *.

(26 U.S.C. 1952 ed., Sec. 52.)

U.S. GOVERNMENT PRINTING OFFICE 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 286

W. M. MILES and EDITH P. MILES,
his wife, et al,
Petitioners,

—vs.—

LAURIE W. TOMLINSON, District Director
of Internal Revenue for the District of Florida,
Respondent.

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States

Your petitioners, W. M. Miles and Edith P. Miles, his wife, H. E. Pontius and Lovina B. Pontius, his wife, and Ralph A. Marsicano and Marie B. Marsicano, his wife, respectfully pray unto the Court for a rehearing of the order of this Court dated October 14, 1963, denying their Petition that a Writ of Certiorari issue to review the holding entered in this cause by the United States Court of Appeals for the Fifth Circuit.

SPECIFIC ISSUE TO WHICH THE REHEARING IS DIRECTED

There is a basic issue on which new light has been shown since the filing of our petition for certiorari. This question is—

> Can a court of appeals, *as a matter of law*, reverse the finding of the trial court that a corporation—
>
> "owned no property, received no income, never received funds in which it had any beneficial interest or which it had any right to retain or against which it had any legal or equitable claim."
>
> (Paragraph 15 of the findings of fact of the trial court, R. 417).

The court of appeals did not determine that such a finding was "clearly erroneous" based on the record. It determined that such a finding could not be made as a matter of law, and that the tax consequences of transactions in property do not follow "ownership" as found by the trial court; but rather, the tax consequences must follow the predilections of the court of appeals for some different result.

No other court has ever so held.

As was pointed out in our petition for the writ in much greater detail, all other courts have consistently held to the contrary.

REASON FOR REHEARING AND ARGUMENT

The brief for the respondent in opposition declares—

> "The decision of the court of appeals in this case is based on well-established principles of federal tax law. There are no conflicting decisions . . . " (p.7)

Since the filing of our petition for certiorari there has been republished, with annotations and supplemental discussions bringing it up to date, a leading and basic legal treatise on the subject of "The Corporate Entity in Tax Cases." Republished as a "Tax Classic" in the Tax Counselor's Quarterly for September, 1963 (Vol. 7, No. 3), this article by George E. Cleary supplemented by the work of Christian M. Lauritzen, II, clearly shows that the pronouncement of respondent, quoted above, is not the truth.

The Cleary article was originally published on the first pages of the first issue of the first volume of Tax Law Review in 1945. As Mr. Lauritzen says,

> "Mr. Cleary's analysis of the tax problems involving the corporate entity is as brilliant and valid today as when it was written. Recent cases merely serve to emphasize the various propositions which he developed in his classic article," (Tax Counselor's Quarterly, September, 1963 (Vol. 7, No. 3, p. 377)).

The important part of the Cleary article to be considered here, is its reference to cases which are actually outside the scope of the subject matter of the article.

> "There is one class of cases, which is really not an exception to the general rule, where the courts have recognized that a corporation, like any other nominee or agent, may hold title for or perform acts for its stockholder. Where the fact can be proved that the corporation was merely holding record title and was not the beneficial owner or that it acted solely as agent for its stockholder, these facts will not be ignored.
>
> [Stewart Forshay, 20 BTA 537 (1930); Comm'r v. Moro Realty Holding Corp., 65 F2d 1013 (CCA 2d, 1933); affirming 25 BTA 1135 (1932); Thrift Real-

ty Co., 29 BTA 545 (1933); 112 West 59th Street Corp. v. Helvering, 68 F2d 397 (App DC 1933); North Jersey Title Ins. Co. v. Comm'r, 84 F2d 898 (CCA 3d, 1936); Mark A. Mayer, 36 BTA 117 (1937); Abrams Sons' Realty Corp., 40 BTA 653 (1939); Archibald R. Watson, 42 BTA 52 (1940); Carling Holding Co., 41 BTA 493 (1940); Woods Lumber Co., 44 BTA 88 (1941); United States v. Brager Building & Land Corp., 124 F2d 349 (CCA 4th, 1941); Lewis Eugene Grigsby Trust, 5 TC No. 7 (1945); The Income Tax Status of the Agency Corporation, 21 Taxes 652 (1943)] (at pp. 361-362).

To be successful in such a case it is necessary for the taxpayer to prove that the corporation has not done the business or held the property for its own account and has consistently been treated as a mere agent or conduit for tax purposes and for other purposes.

[Cf. Comm'r v. Court Holding Company, 324 US 331 (1945) (in which a sale in form made by the stockholders was held to have been made in fact by the corporation)] (at p. 362).

"This principle is well illustrated in the recent case of Paymer v. Commissioner."

[150 F2d 334 (CCA 2d, 1945)]. (at p. 362).

"The decision in the Moline Properties case, which was subsequent to most of the cases referred to above, indicates how strict the courts will be in refusing to permit the corporate entity to be disregarded by the taxpayer. Even since that decision, however, *it seems clear that a corporation may act merely as nominee title holder or agent for its stockholder*, but the taxpayer must prove a clear case and a consistent course of conduct to come within this principle." (Emphasis added) (at p. 363).

Thus, the article concludes—

> "It may be possible for taxpayers to prove in particular cases that the corporation acted merely as nominee or holder of record title or as agent for its stockholders, so that the stockholder is the real party in interest or the corporation is a mere sham. [Paymer v. Comm'r, 150 F2d 334 (CCA 2d, 1945)]. *The application of such a principle does not involve disregard of the corporate entity but rather proof as to what the transaction in fact was.*" (at p. 374) (Emphasis added).

Bringing the entire matter of the corporate entity down to date, Mr. Lauritzen re-summarized the subject of "Mere Title Holding Corporations", although in terms slightly different from those approved by Mr. Cleary:

> "If a corporation is a dummy which *does nothing more than hold title to property*, then the corporate entity can be disregarded. (Moot v. Commissioner, TC Memo Opinion 105520 (November 4, 1942); U. S. v. Jelenko, 23 F2d 511 (1927); Thompson v. United States, 110 F2d 585 (1940); Forshay v. Commissioner, 20 BTA 537; and Rae v. Commissioner, BTA Memo No. 107371 (September 25, (1942)). (Seattle Hardware Company v. Squire, 83 F Supp 106 (1948); K-C Land Company, Inc., TC Memo 1960-35 (1960))." (at p. 392) (Emphasis added).

In the instance case, the taxpayers proved—and the trial judge unequivocally *found* that they proved—precisely what Professor Cleary said should be proved. The court of appeals found no error in the trial court's finding of ownership.

Thus, for the first time, and contrary to all decided cases on the subject, a tax has been imposed on transactions in property where the taxpayer has been judi-

cially determined to have *no ownership* in the property from which gains were derived. This goes to the foundations of taxation. (*See Poe v. Seaborn*, 282 US 101, 75 L.ed 239: "The use of the word 'of' denotes ownership." US at p. 109; L.ed at p. 243).

Under the circumstances we simply cannot understand the government's attitude. Review by this Court should be welcomed to settle the multitude of cases which have been generated into litigation by the taxing agency's effort to overrule *Paymer v. Commissioner*, 150 F2d 334, CA 2, 1945, and the numerous Tax Court and other cases following the same doctrine.

To try to slip this one by as being "based on well-established principles of federal tax law", serves no useful purpose, prolongs the litigation of tax controversies, and frustrates the administration of justice under tax law.

We respectfully urge the Court to reconsider its denial of the writ, to let the writ issue, and to order the relief prayed for in our petition for the writ.

Respectfully submitted,

George W. Ericksen

Of MACFARLANE, FERGUSON, ALLISON & KELLY
605 Franklin Street
P. O. Box 1531
Tampa, Florida 33601

CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified in Rule 58 of the rules of this Court.

George W. Ericksen

Of MACFARLANE, FERGUSON, ALLISON & KELLY
605 Franklin Street
P. O. Box 1531
Tampa, Florida 33601

AFFIDAVIT OF SERVICE

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH:

BEFORE ME, the undersigned authority, this day personally appeared GEORGE W. ERICKSEN, who being first duly sworn says that he is counsel for the Petitioners in this cause, and that he did furnish copies of the foregoing Petition for Rehearing on Denial of Writ of Certiorari to ARCHIBALD COX, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and LOUIS F. OBERDORFER, Assistant Attorney General of the United States, Department of Justice, Washington 25, D. C., by *Air Mail*, and to EDWARD F. BOARDMAN, United States Attorney, 409 Federal Building, Tampa, Florida, in an envelope addressed to said attorneys as aforesaid with sufficient United States postage thereon to insure delivery, on the day of October, 1963.

George W. Ericksen

Sworn to and subscribed before me, this day of October, 1963.

Notary Public, State of Florida at Large

My Commission expires: